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Facsimile: (213) 457-1850
6 Attorneys for Defendant
NATIONWIDE LIFE INSURANCE COMPANY

7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 DONALD SAXBY, an individual, and
11 BARBARA SAXBY, an individual,

12 Plaintiffs,

13 vs.

14 NATIONWIDE LIFE INSURANCE
15 COMPANY, dba NATIONWIDE
16 HEALTH PLANS, and DOES 1 through
50, inclusive,

17 Defendants.

18 Case No. CV08-1165 JL

19
20 **NOTICE TO ADVERSE PARTY OF
FILING REMOVAL OF CIVIL
ACTION TO FEDERAL COURT
UNDER 28 U.S.C. § 1441(b)
(DIVERSITY)**

21 TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on February 27, 2008, defendant Nationwide
23 Life Insurance Company (“Nationwide”), filed a Notice of Removal of Civil Action
in the United States District Court, Northern District of California, a copy of which is
served upon you concurrently herewith.

24 ///

25 ///

26 ///

1 PLEASE ALSO TAKE NOTICE that a copy of the Notice of Removal is being
2 filed with the clerk of the Superior Court for the State of California, County of Marin.
3

4 Dated: February 28, 2008

JOHN L. VIOLA
JOEL D. COVELMAN
DYKEMA GOSSETT LLP

6 By:

John L. Viola
Joel D. Covelman
Attorneys for Defendant
Nationwide Life Insurance Company

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DYKEMA GOSSETT LLP
333 South Grand Avenue
Suite 2100
Los Angeles, California 90071

ORIGINAL
FILED

FEB 27 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

JL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DONALD SAXBY, an individual, and
BARBARA SAXBY, an individual,

Plaintiffs,

vs.

NATIONWIDE LIFE INSURANCE
COMPANY, dba NATIONWIDE
HEALTH PLANS, and DOES 1 through
50, inclusive,

Defendants.

CV 08 1165
Case No.

NOTICE OF REMOVAL OF CIVIL
ACTION TO FEDERAL COURT
UNDER 28 U.S.C. § 1441(b)
(DIVERSITY)

TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE TAKE NOTICE that defendant Nationwide Life Insurance Company ("Nationwide") hereby removes this civil action from the Superior Court of the State of California for the County of Marin to the United States District Court, Central District of California. This Notice of Removal of Action under 28 U.S.C. § 1441(b) (Diversity) ("Notice") is based upon the following:

1. On or about February 27, 2007, an action was commenced in the Superior Court of the State of California for the County of Marin (the "Superior Court"), entitled *Donald Saxby, an individual, and Barbara Saxby, an individual vs.*

NOTICE OF REMOVAL OF CIVIL ACTION

DYKEMA GOSSETT LLP
333 SOUTH GRAND AVENUE
SUITE 2100
LOS ANGELES, CALIFORNIA 90071

1 *Nationwide Life Insurance Company, dba Nationwide Health Plans, Linda DeBolt,*
2 *and Does 1 to 50, inclusive, as Case Number CV070858.*

3 2. Service of Plaintiffs' Complaint was made on Nationwide on February
4 27, 2007. Copies of all process, pleadings and orders served upon defendant are
5 attached hereto as Exhibit 1, pursuant to 28 U.S.C. § 1446(a), and incorporated herein.

6 3. The case was not removed at that time to federal court due to the
7 presence of a non-diverse defendant, Linda DeBolt, a California resident.

8 4. On February 26, 2007, Nationwide received notice, a copy of which is
9 attached as Exhibit 2, that plaintiffs had settled with Ms. DeBolt. This Notice
10 evidences a voluntary abandonment by plaintiffs of their claims against defendant
11 Linda DeBolt. *See, Delatte v. Zurich Ins. Co.* (MDLA 1988) 683 F. Supp. 1062,
12 1063; *Heniford v. American Motor Sales Corp.* (D SC 1979) 471 F.Supp. 328, 344.

13 5. Pursuant to 28 U.S.C. § 1446(b), this Notice is filed within thirty (30)
14 days of receipt of such notice of settlement and not more than 1 year after
15 commencement of the action.

16 6. **JURISDICTION.** The United States District Court for the Central
17 District of California is the district in which the state court action was filed. This
18 Court has jurisdiction pursuant to 28 U.S.C. §§ 1332, 1333, 1441(a) and 1446
19 because this Court has "diversity" jurisdiction.

20 a. Pursuant to 28 U.S.C. § 1332, this Court has original jurisdiction
21 of all civil actions where the matter in controversy exceeds the sum or value of
22 \$75,000, exclusive of interest and costs, and is between citizens of different states.

23 b. Nationwide is informed and believes that Plaintiffs Donald and
24 Barbara Saxby are citizens of the County of Marin, State of California. [See Exhibit
25 1, Complaint ¶ 6.]

26 c. Nationwide is a citizen of the State of Ohio. At the time this
27 action was filed, at the time of this Notice of Removal, and at all relevant times,
28 defendant Nationwide is and was a citizen and resident of the State of Ohio.

1 d. Although the Complaint alleges that defendant Linda DeBolt is a
 2 California resident [Complaint, ¶ 8], the citizenship of defendant DeBolt should be
 3 disregarded for purposes of determining jurisdiction under 28 U.S.C. § 1332 because
 4 DeBolt is a “sham defendant”. In the Complaint, plaintiffs allege claims against
 5 Nationwide for breach of contract, breach of the duty of good faith and fair dealing,
 6 declaratory relief and violation of California Business & Professions Code § 17200,
 7 all based on Nationwide’s decision to rescind their certificate of insurance based on
 8 the misrepresentations on the application for insurance. Plaintiffs’ sole claim against
 9 Ms. DeBolt is their claim for Professional Negligence. Review of this claim,
 10 however, reveals that it is based entirely on Ms. DeBolt’s alleged negligent assistance
 11 in plaintiffs’ completion of the application for insurance to Nationwide. [Complaint,
 12 ¶¶ 49-54.] In fact, however, plaintiffs admit that they completed the application “on
 13 line”, over the internet, without Ms. DeBolt’s assistance, and did not describe to her
 14 any of their medical conditions. Thus, plaintiffs have settled with Ms. DeBolt and are
 15 in the process of dismissing her from the Complaint. [See Ex. 2.]

16 Thus, Ms. DeBolt was joined solely as a sham defendant and her fraudulent
 17 joinder to the complaint should not defeat diversity. *See Morris v. Princess Cruises,*
 18 *Inc.*, 236 F.3d 1061, 1067-68 (9th Cir. 2001) (“Joinder of a non-diverse defendant is
 19 deemed fraudulent, and the defendant’s presence in the lawsuit is ignored for
 20 purposes of determining diversity, if the plaintiff fails to state a cause of action
 21 against a resident defendant, and the failure is obvious according to the settled rules
 22 of the state.”); *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)
 23 (“The defendant seeking removal to the federal court is entitled to present the facts
 24 showing the joinder to be fraudulent”). The citizenship of Ms. DeBolt, therefore,
 25 should be disregarded for purposes of determining jurisdiction under 28 U.S.C. §
 26 13332.

27 e. Pursuant to 28 U.S.C. § 1441(a), the citizenship of defendants
 28 sued under fictitious names shall be disregarded when determining removal

1 jurisdiction. Accordingly, the citizenship of Does 1 through 50 should not be
2 considered when determining whether jurisdiction based on diversity of citizenship
3 exists in this case.

4 f. This is a civil action between citizens of different states, and the
5 matter in controversy exceeds the sum of one hundred thousand dollars (\$350,000),
6 exclusive of interest and costs. Plaintiffs also seek exemplary and punitive damages.

7 g. Joinder in this Notice of Removal by defendant Linda DeBolt,
8 who has settled this action with plaintiffs (see ¶ 4, supra, and Exhibit 2) and was
9 named solely as a "sham defendant", to defeat diversity, is not required. *Farias v.*
10 *Bexar County Bd. of Trustees for Mental Health* (5th Cir. 1991) 925 F. 2d 866, 871.

11 7. **INTRA DISTRICT ASSIGNMENT.** Pursuant to Local Rule 3-5(b),
12 Nationwide states that this case should be assigned to the San Francisco or Oakland
13 Division, pursuant to Local Rule 3-2(d).

14 8. In accordance with 28 U.S.C. § 1446(d), copies of this Notice of
15 Removal shall be timely served upon Plaintiffs, through their counsel of record, and a
16 copy of this Notice of Removal shall be timely filed with the Superior Court.

17 9. In removing this action, Nationwide does not intend to waive any rights
18 or defenses to which it is otherwise entitled under state or federal law, as applicable,
19 including but not limited to those set forth in the Federal Rules of Civil Procedure,
20 including, but not limited to, lack of personal jurisdiction, improper service and
21 improper venue.

22 10. This Notice of Removal is signed pursuant to Rule 11 of the Federal
23 Rules of Civil Procedure and in accordance with 28 U.S.C. § 1446. The statements
24 and allegations contained herein are true and correct to the best of the knowledge and
25 belief of the undersigned based upon a review of the material available, including
26 Exhibit A hereto.

27 11. Based on the foregoing, Nationwide has met its burden of establishing
28 that this Court has original jurisdiction over this civil action pursuant to 28 U.S.C. §

1 1332(a) and that this action is one that may be removed to this Court by defendant
2 pursuant to 28 U.S.C. § 1441, because there is complete diversity of citizenship
3 between the parties and the amount in controversy exceeds \$75,000.00, exclusive of
4 interest and costs.

5 WHEREFORE, NATIONWIDE LIFE INSURANCE COMPANY, respectfully
6 removes this action, currently pending in the Superior Court of the State of California
7 for the County of Marin, as Case No. CV070858, to the United States District Court,
8 North District of California.

9
10 Dated: February 26, 2008

JOHN L. VIOLA
JOEL D. COVELMAN
DYKEMA GOSSETT LLP

11 By:


John L. Viola
Joel D. Covelman
Attorneys for Defendant
Nationwide Life Insurance Company

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EXHIBIT 1

02/27/2007 TUE 16:08 FAX 707 545 5454 Attorneys Diversified

003/005

02/27/2007 08:56 FAX 8084472043

SHERNOFF BIDART & DARRAS

004/017

SUM-100

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

NATIONWIDE LIFE INSURANCE COMPANY, dba NATIONWIDE HEALTH PLANS, LINDA DEBOLT, an individual and DOES 1 through 50 inclusive.

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

DONALD SAXBY, an individual, and BARBARA SAXBY, an individual,

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED

FEB 27 2007

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: B. Jones Deputy

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DIAS DE CALENDARIO después de que le entreguen esta citación y papelería legal para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER:
(Número del Caso):

CV070858

Marin Superior Court
3501 Civic Center Drive
San Rafael, California 94913

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

#38856

909-621-4935

SHERNOFF BIDART & DARRAS
600 S. Indian Hill Boulevard
Claremont, California 91171

DATE: FEB 27 2007
(Fecha)

KIM TURNER

Clerk, by _____
(Secretario)B. JONES, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

- (SEAL)
- 
- as an individual defendant.
 - as the person sued under the fictitious name of (specify): *Nationwide Life Insurance Company, dba Nationwide Health Plans*
 - on behalf of (specify): *Nationwide Life Insurance Company, dba Nationwide Health Plans*
under: CCP 416.10 (corporation)
 CCP 416.20 (defunct corporation)
 CCP 416.40 (association or partnership)
 other (specify):
 - by personal delivery on (date):
- CCP 416.60 (minor)
 CCP 416.70 (conservatee)
 CCP 416.80 (authorized person)

02/27/2007 TUE 16:08 FAX 707 545 5454 Attorneys Diversified
 02/27/2007 08:55 FAX 8084472043 SHERNOFF BIDART & DARRAS

002/005

002/017

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): William M. Shernoff, Esq. #38856 SHERNOFF BIDART & DARRAS 600 S. Indian Hill Boulevard Claremont, California 91711 TELEPHONE NO 909-621-4935 FAX NO 909-625-5915		FOR COURT USE ONLY RECEIVED MARIN COUNTY SUPERIOR COURT FEB 27 2007 P 11:24
ATTORNEY FOR (Name) Plaintiffs, DONALD SAXBY, et al. SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN STREET ADDRESS: 3501 Civic Center Drive MAILING ADDRESS: CITY AND ZIP CODE: San Rafael 94913 BRANCH NAME:		
BY FAX		
CASE NAME: SAXBY, et al. v. NATIONWIDE LIFE INSURANCE, et al.		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited <input type="checkbox"/> Limited. Amount demanded (Amount) demanded is exceeds \$25,000) \$25,000 or less		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)
		CASE NUMBER CV070858 JUDGE R. F. Davis DEPT: E

Items 1-5 below must be completed (see Instructions on page 2).

1. Check one box below for the case type that best describes this case: Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (64) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (26) <input type="checkbox"/> Other non-PI/PD/WD tort (36) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (16)		Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Collections (09) <input checked="" type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800-1812) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case is is not complex under rule 1800 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. Large number of separately represented parties d. Large number of witnesses
- b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
- c. Substantial amount of documentary evidence f. Substantial postjudgment judicial supervision

3. Type of remedies sought (check all that apply):

- a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): 5

5. This case is is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015)

Date: February 27, 2007

WILLIAM M. SHERNOFF

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
 Judicial Council of California
 #010 (Rev January 1, 2008)

CIVIL CASE COVER SHEET

American Legal Net, Inc.
www.USCourtForms.com

Cal. Rules of Court, rules 201.8, 1800-1812,
 Standards of Judicial Administration, § 18
www.courtinfo.ca.gov

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers

If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the Civil Case Cover Sheet contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 5 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. You do not need to submit a cover sheet with amended papers. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 201.8(c) and 227 of the California Rules of Court.

To Parties in Complex Cases

In complex cases only, parties must also use the Civil Case Cover Sheet to designate whether the case is complex. If a plaintiff believes the case is complex under rule 1800 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

- Auto (22)-Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

- Asbestos (04)
 - Asbestos Property Damage
 - Asbestos Personal Injury/ Wrongful Death
- Product Liability (*not asbestos or toxic/environmental*) (24)
- Medical Malpractice (45)
 - Medical Malpractice- Physicians & Surgeons
 - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
 - Premises Liability (e.g., slip and fall)
 - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
 - Intentional Infliction of Emotional Distress
 - Negligent Infliction of Emotional Distress

Non-PI/PD/WD (Other) Tort

- Business Tort/Uncivil Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) (*not civil harassment*) (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
 - Legal Malpractice
 - Other Professional Malpractice (*not medical or legal*)
- Other Non-PI/PD/WD Tort (35)

Employment

- Wrongful Termination (36)
- Other Employment (15)

Contract

- Breach of Contract/Warranty (06)
 - Breach of Rental/Lease
 - Contract (*not unlawful detainer or wrongful eviction*)
 - Contract/Warranty Breach-Seller Plaintiff (*not fraud or negligence*)
 - Negligent Breach of Contract/ Warranty
 - Other Breach of Contract/Warranty Collections (e.g., money owed, open book accounts) (09)
 - Collection Case-Seller Plaintiff
 - Other Promissory Note/Collections Case
- Insurance Coverage (*not provisionally complex*) (18)
 - Auto Subrogation
 - Other Coverage
- Other Contract (37)
 - Contractual Fraud
 - Other Contract Dispute

Real Property

- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
 - Writ of Possession of Real Property
 - Mortgage Foreclosure
 - Quiet Title
 - Other Real Property (*not eminent domain, landlord/tenant, or foreclosure*)

Unlawful Detainer

- Commercial (31)
- Residential (32)
- Drugs (38) (*if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential*)

Judicial Review

- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
 - Writ-Administrative Mandamus
 - Writ-Mandamus on Limited Court Case Matter
 - Writ-Other Limited Court Case Review
- Other Judicial Review (39)
 - Review of Health Officer Order
 - Notice of Appeal-Labor Commissioner Appeals

Provisionally Complex Civil Litigation

- (Cal. Rules of Court Rules 1800-1812)
- Antitrust/Trade Regulation (03)
 - Construction Defect (10)
 - Claims Involving Mass Tort (40)
 - Securities Litigation (28)
 - Environmental/Toxic Tort (30)
 - Insurance Coverage Claims (*arising from provisionally complex case type listed above*) (41)

Enforcement of Judgment

- Enforcement of Judgment (20)
- Abstract of Judgment (Out of County)
- Confession of Judgment (*non-domestic relations*)
- Sister State Judgment
- Administrative Agency Award (*not unpaid taxes*)
- Petition/Certification of Entry of Judgment on Unpaid Taxes
- Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

- RICO (27)
- Other Complaint (*not specified above*) (42)
- Declaratory Relief Only
- Injunctive Relief Only (*non-harassment*)
- Mechanics Lien
- Other Commercial Complaint Case (*non-tort/non-complex*)
- Other Civil Complaint (*non-tort/non-complex*)

Miscellaneous Civil Petition

- Partnership and Corporate Governance (21)
- Other Petition (*not specified above*) (43)
- Civil Harassment
- Workplace Violence
- Elder/Dependent Adult Abuse
- Election Contest
- Petition for Name Change
- Petition for Relief from Late Claim
- Other Civil Petition

02/27/2007 TUE 16:09 FAX 707 545 5454 Attorneys Diversified
02/27/2007 08:56 FAX 8094472048 SHERNOFF BIDART & DARRAS

004/005
005/017

1 WILLIAM M. SHERNOFF #38856
2 EVANGELINE FISHER GROSSMAN #176014
3 JOEL COHEN #202851
4 SHERNOFF BIDART & DARRAS, LLP
5 600 South Indian Hill Boulevard
6 Claremont, CA 91711
7 Telephone: (909) 621-4935
8 Facsimile: (909) 625-6915

9
10 Attorneys for Plaintiffs

FILED

FEB 27 2007

KIM TURNER
CLERK OF COURT, MARIN COUNTY SUPERIOR COURT
BY E. TURNER, CLERK

BY FAX

9
10
11 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
12
13 FOR THE COUNTY OF MARIN

14
15 DONALD SAXBY, an individual, and
16 BARBARA SAXBY, an individual,

17 Plaintiffs,

18 vs.

19 NATIONWIDE LIFE INSURANCE
20 COMPANY, dba NATIONWIDE HEALTH
21 PLANS, LINDA DEBOLT, an individual
22 and DOES 1 through 50 inclusive,

23 Defendants.

Case No.: CV07 0858

COMPLAINT

1. Breach of Contract
2. Breach of Duty of Good Faith and Fair Dealing
3. Declaratory relief
4. Violation of Business & Professions Code Section 17200, et seq.
5. Professional Negligence

DEMAND FOR JURY TRIAL

I. INTRODUCTION

1. This action arises from Nationwide's illegal and unfair scheme of rescinding individual insurance policy contracts in response to claims made by insureds.

- 1 -

COMPLAINT AND DEMAND FOR JURY TRIAL

1 2. Plaintiffs are informed and believe and thereon allege that Nationwide has a
 2 custom and practice of improperly rescinding policies. As a result, Nationwide has reaped
 3 substantial profits by retaining unpaid benefits. Insureds have reaped substantial, sometimes
 4 crushing, financial burdens because their medical providers seek to collect payment directly from
 5 them. Nationwide's practice is particularly reprehensible because it deprives insureds of their
 6 health coverage at precisely the moment they need it and subjects them to emotional and
 7 financial distress at precisely the time when they are most vulnerable.

8 3. Plaintiffs are victims of the foregoing scheme. Plaintiff Donald Saxby injured his
 9 left knee while skiing on February 12, 2006. He required surgery and additional treatment.
 10 Nationwide conducted postclaims underwriting. Nationwide purported to find a material
 11 omission in plaintiffs' application, purported to rescind the contract and refused to pay plaintiff's
 12 medical providers. As a result, plaintiff's providers sought, and continue to seek, payment from
 13 plaintiff.

14 4. The purported rescission of plaintiff's policy is void. The postclaims
 15 underwriting conducted by Nationwide violates California law and constitutes an unfair business
 16 practice:

17 a. Nationwide was obligated to pay plaintiff's medical providers who rendered
 18 services and treatment to plaintiff in good faith after they were authorized by Nationwide
 19 (Insurance Code ["Ins. C."] § 796.04);

20 b. Nationwide was prohibited from engaging in postclaims underwriting (Ins. C. §
 21 10384);

22 c. The Medical Information questionnaire contained in Nationwide's form
 23 application is designed to trap innocent persons into making misstatements and omissions in
 24 their answers in order to justify rescissions. The Medical Information questionnaire is unfair in
 25 that it is confusing, overbroad, ambiguous and in effect unintelligible to persons of ordinary
 26 intelligence. Further, the Medical Information questionnaire is unfair in that it provides only for
 27 unqualified "yes" or "no" answers, and fails to provide for responses in circumstances where a
 28 person might not recall past events or fully understand the import of the question and the

1 consequences of the answer.

2 5. As more fully alleged below, plaintiffs are informed and believe and thereon
3 allege that Nationwide has a custom and practice of rescinding policies in violation of the
4 foregoing statutes and engaging in the foregoing unfair practices, and that such illegal and unfair
5 conduct is ongoing. In this action plaintiffs seek damages for breach of contract and bad faith, a
6 judicial declaration as to Nationwide's obligation to pay claims under the agreements in
7 question, and an injunction prohibiting Nationwide from continuing its illegal and unfair
8 conduct.

9 II. THE PARTIES

10 6. Plaintiffs are, and at all relevant times were, residents of the City of San Rafael,
11 County of Marin, State of California.

12 7. Plaintiffs are informed and believe and thereon allege that Defendant Nationwide
13 Life Insurance Company dba Nationwide Health Plans ("Nationwide") is a company duly
14 authorized to transact and transacting the business of insurance in the State of California.
15 Nationwide handles its California health insurance business from its corporate offices in
16 Sacramento, California.

17 8. Plaintiff is informed and believes and thereon alleges that Defendant Linda
18 Debolt is an appointed agent of Nationwide. Linda Debolt is the insurance agent that directed
19 plaintiff through the application process with Nationwide. Linda Debolt is authorized to transact
20 and is transacting the business of an insurance agent in the State of California. Linda Debolt is
21 located in the City of Petaluma, County of Marin, State of California.

22 9. The true names or capacities, whether individual, corporate, associate, or
23 otherwise, of defendants DOES 1 through 50, are unknown to plaintiff, who therefore designates
24 those defendants by these fictitious names. Each of the defendants sued herein as a DOE is
25 legally responsible in some manner for the events and happenings referred to and proximately
26 caused the injuries suffered by plaintiff. Plaintiffs will amend this complaint to allege their true
27 names and capacities when the same becomes known to plaintiffs.

28 10. Plaintiffs are informed and believe and thereon allege that at all relevant times

1 each of the defendants was the agent and employee of each of the remaining defendants, and in
 2 doing the things hereinafter alleged was acting within the course and scope of such agency and
 3 employment.

III. JURISDICTION

5 11. Jurisdiction is proper in that the amount in dispute exceeds the jurisdictional
 6 minimum of this Court.

IV. FACTUAL BACKGROUND

8 12. Plaintiffs applied for health care coverage with Nationwide Health Plans in
 9 January 2006. Barbara Saxby accessed the application, filled it out and submitted it online. At
 10 that time plaintiffs applied for the Nationwide policy they were insured with Blue Shield and had
 11 been insured for over three years. Plaintiffs were enticed to switch from Blue Shield to
 12 Nationwide because the Blue Shield policy had become very expensive. Their Blue Shield
 13 policy information was disclosed on the application for coverage with Nationwide.

14 13. After submitting the application online Barbara printed it out for her records.
 15 Upon reviewing the application with her husband, plaintiffs realized that she had misunderstood
 16 certain questions and, as a consequence, had inadvertently omitted information. Barbara called
 17 the customer service line for Nationwide and the Nationwide agent in order to add omitted
 18 information and correct errors or misunderstandings. Both the service representative and the
 19 agent assured them that these problems would be caught when Nationwide processed the
 20 application. Until they heard from the insurance company, they need not be concerned.

21 14. Nationwide approved plaintiffs for coverage under the Lifestyle 2500 \$2,500
 22 Deductible w/ 3-Tier Rx (Plan AL) health plan, policy number GH1000, certificate number
 23 709634 with an effective date of February 1, 2006. Thereafter, Nationwide delivered to
 24 plaintiffs the "Certificate of Insurance" (the "Policy").

25 15. After the policy went into effect, plaintiff Donald Saxby suffered a serious injury
 26 to his left knee as a result of a skiing accident on February 12, 2006. He received treatment and
 27 underwent knee surgery in March of 2006.

28 16. Nationwide authorized the surgery for plaintiff.

1 17. The medical providers submitted claims to Nationwide. Thereafter, Nationwide
 2 obtained medical records from plaintiff's personal physician, Dr. Bernstein-Lawler, back to
 3 February of 2001, five years before the application was filled out.

4 18. Nationwide informed Mr. Saxby in a letter dated October 4, 2006 that there
 5 appeared to be discrepancies between the information given on the application for coverage and
 6 the information noted in the medical records. This letter contained excerpts from these medical
 7 records. The doctor's records indicated that plaintiff had Factor IX Deficiency. In addition, his
 8 doctor had prescribed medication for depression, and he was referred for counseling in 2002 and
 9 2003. Also, he received continuing treatment for asthma and hay fever. Nationwide requested
 10 additional information from plaintiff, including whether the medical information in the excerpts
 11 from the medical records was correct and why this medical information was not noted on the
 12 application for coverage.

13 19. Mr. Saxby responded to the request for information in a letter to Nationwide
 14 dated December 1, 2006. His letter stated that in 1987 a doctor told him that due to his Factor IX
 15 deficiency he may have some trouble with internal bleeding should he have a major surgery but
 16 it was nothing to worry about. This is what he told Dr. Bernstein-Lawler. He has never had a
 17 problem with bleeding in day to day life, and he did not require treatment for this condition until
 18 his knee surgery in March 2006. He stated that he has not been diagnosed with clinical
 19 depression. He sought counseling because he was under the stress of a career change and
 20 purchase of a house. His outlook became brighter and has remained so. He disclosed his
 21 treatment for asthma and hay fever on the application for coverage.

22 20. Plaintiff stated in this letter that his wife, Barbara, had filled out the application
 23 for coverage online. She answered the questions as to what she knew to be true. She filled out
 24 the application based on the information that she had. She had assistance in completing the
 25 application from both the Nationwide agent and the Nationwide customer service representative.
 26 He also informed Nationwide in this letter that after the application was submitted, they realized
 27 that Barbara had misunderstood certain questions. She called both the customer service line and
 28 the Nationwide agent who had assisted them in order to add omitted information and correct the

1 errors. They were assured by both the customer service representative and the Nationwide agent
 2 that misunderstandings or errors would be caught when Nationwide processed the application,
 3 and until they heard from the insurance company, they need not be concerned.

4 21. In a letter dated December 18, 2006, Nationwide purported to rescind plaintiff
 5 Donald Saxby's Policy on the ground that plaintiff failed to disclose material information
 6 on the Application. Nationwide contended it would not have insured him if it had known such
 7 information.

8 22. Plaintiffs are informed and believe and thereon allege that the purported
 9 rescission of Mr. Saxby's Policy was a result of a postclaims underwriting investigation
 10 conducted by the defendant. Plaintiffs are informed and believe and thereon allege that
 11 Nationwide's "investigation" was nothing more than a fishing expedition to justify a rescission
 12 of plaintiff's Policy. Further, plaintiffs did not fully understand the meaning of questions on
 13 Nationwide's exceedingly confusing, overbroad, ambiguous and unintelligible Medical
 14 Information questionnaire or appreciate the consequences of their answers to such questions.

15 23. As a result of its purported rescission of Donald Saxby's Policy, Nationwide
 16 refused to pay claims submitted by medical providers who rendered services and treatment to
 17 plaintiff in good faith pursuant to Nationwide's authorization of such treatment.

18 24. Nationwide's postclaims underwriting review of plaintiff's file violated Ins. C. §
 19 10384, which prohibits postclaims underwriting.

20 25. Plaintiff was the express intended beneficiary of Nationwide's authorization of
 21 treatments performed by the medical providers. Nationwide's refusal to pay the medical
 22 providers violated Ins. C. § 796.04, which prohibits a health insurer from rescinding or
 23 modifying its authorization of services or treatment after the provider renders such service or
 24 treatment in good faith pursuant to the authorization. As a result of Nationwide's refusal to pay,
 25 the medical providers have billed plaintiff directly for their services.

26 ///

27 ///

28 ///

1 **FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**

2 (Nationwide)

3 26. Plaintiffs refer to all the preceding paragraphs and incorporate those paragraphs as
4 though set forth in full in this cause of action.

5 27. Plaintiffs paid all premiums due and performed all of their obligations under the
6 Policy.

7 28. Nationwide's purported rescission of the Policy constitutes a breach of contract in
8 that Nationwide failed to pay benefits owed under the Policy.

9 29. As a proximate result of Nationwide's breach of contract, plaintiffs have suffered
10 general and consequential damages under the Policy in an amount to be determined according to
11 proof at the time of trial, plus interest.

12 **SECOND CAUSE OF ACTION FOR BREACH OF THE DUTY**

13 **OF GOOD FAITH AND FAIR DEALING**

14 (Nationwide)

15 30. Plaintiffs refer to all preceding paragraphs and incorporate those paragraphs as
16 though set forth in full in this cause of action.

17 31. Nationwide has breached the duty of good faith and fair dealing owed to plaintiffs
18 in the following respects:

19 a. Unreasonably and in bad faith refusing to pay benefits owed under the Policy;
20 b. Unreasonably and in bad faith conducting postclaims underwriting in violation of
21 Ins. C. § 10384;

22 c. Unreasonably and in bad faith refusing to pay benefits to plaintiff's medical
23 providers for services and treatments rendered in violation of Ins. C. § 796.04; and

24 d. Proximately causing plaintiff's medical providers to bill plaintiff directly for
25 services and treatment that Nationwide was obligated to pay for as result of its authorization of
26 such services and treatment.

27

28

1 32. Plaintiffs are informed and believe and thereon allege that Nationwide has
 2 breached its duty of good faith and fair dealing owed to plaintiffs by other acts or omissions of
 3 which plaintiffs are presently unaware and which will be shown at the time of trial.

4 33. As a proximate result of the aforementioned unreasonable and bad faith conduct
 5 of Nationwide, plaintiffs have suffered, and will continue to suffer in the future, damages under
 6 the policy, including damages for emotional distress, in an amount to be proven at trial, plus
 7 interest.

8 34. As a further and proximate result of the unreasonable and bad faith conduct of
 9 Nationwide, plaintiffs were compelled to retain legal counsel and to institute litigation to obtain
 10 the benefits due under the Policy. Therefore, Nationwide is liable for those attorneys' fees
 11 reasonably incurred in order to obtain plaintiff's benefits under the Policy.

12 35. Nationwide's conduct as described herein was despicable and was committed
 13 maliciously, fraudulently and oppressively with the wrongful intention of injuring plaintiff and
 14 with a willful and conscious disregard of the rights of plaintiff. Nationwide subjected plaintiff to
 15 cruel and unjust hardship, and via intentional misrepresentation, deceit, or concealment of
 16 material facts, Nationwide intended to deprive plaintiff of property or legal rights all to the
 17 detriment of plaintiff and to the financial benefit of Nationwide. Accordingly, plaintiff is entitled
 18 to recover exemplary and punitive damages under Civil Code § 3294, in an amount according to
 19 proof, in order to punish and to make an example of Nationwide, and to deter such conduct in the
 20 future.

21 36. Nationwide's conduct described herein was undertaken by Nationwide's officers,
 22 directors and managing agents, who were responsible for corporate policies, medical
 23 underwriting, claims supervision and operational decisions. The previously described conduct of
 24 said officers, directors and managing agents was therefore undertaken on behalf of the corporate
 25 defendant. Said corporate defendant further had advance knowledge of the actions and conduct
 26 of other employees, including but not limited to, underwriters and claims adjusters, whose
 27 actions and conduct were ratified, authorized, and approved by the corporate defendant.
 28

1 37. Nationwide's conduct is particularly reprehensible because it was part of a
2 repeated corporate practice and not an isolated occurrence. Plaintiffs are informed and believe
3 and thereon allege that Nationwide has engaged in similar wrongful conduct as to individuals
4 other than plaintiffs and that Nationwide has substantially increased its profits as a result of
5 causing similar harm to others.

THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF

(Nationwide)

8 38. Plaintiffs refer to all preceding paragraphs and incorporate those paragraphs as
9 though set forth in full in this cause of action.

10 39. Plaintiff Donald Saxby is a party to the insurance contract with Nationwide.
11 Plaintiff also is the third party beneficiary of Nationwide's authorization for providers to render
12 services and treatment to plaintiff. Plaintiff obtained services and treatment with the justified
13 expectation that his medical bills would be covered by Nationwide, under the terms of his Policy
14 and pursuant to Nationwide's authorization to providers. Plaintiff's providers treated plaintiff in
15 good faith after Nationwide authorized such treatments. The law prohibits Nationwide from
16 reneging on its authorization and refusing to pay the providers.

17 40. Under Code of Civil Procedure section 1060, plaintiff has an interest in his Policy
18 and in Nationwide's authorization to providers to render treatment on his behalf. A present and
19 actual controversy exists between plaintiff, Nationwide, and plaintiff's providers in that
20 Nationwide's refusal to pay providers has caused providers to bill plaintiff directly. As a result,
21 plaintiff has been threatened with collection, is subject to possible lawsuits, and has been forced
22 to grant liens to providers in order to forestall such collection efforts and possible lawsuits. Such
23 actual and imminent events have caused, and will continue to cause, great harm to plaintiff's
24 credit, economic well-being and emotional well-being.

25 41. Plaintiffs request a declaration from this Court that Nationwide has an obligation
26 to pay all of the claims submitted by the medical providers who rendered services and treatment
27 to plaintiff Donald Saxby in good faith after Nationwide authorized such treatment. Plaintiffs
28

1 further request a declaration that plaintiff Donald Saxby is not liable to medical providers for any
 2 sums that are the responsibility of Nationwide.

3 **FOURTH CAUSE OF ACTION FOR VIOLATION OF BUSINESS & PROFESSIONS**

4 **CODE SECTION 17200 et seq.**

5 (Nationwide)

6 42. Plaintiffs refer to all preceding paragraphs and incorporate those paragraphs as
 7 though set forth in full in this cause of action.

8 43. Nationwide's conduct as described herein constitutes unfair competition under
 9 Business & Professions Code section 17200. As more fully alleged above, that conduct includes
 10 the following unlawful, fraudulent or unfair business acts or practices:

11 a. Utilizing a Medical Information questionnaire that is unfair as alleged above;
 12 b. Engaging in postclaims underwriting in violation of Ins. C. § 10384;
 13 c. Rescinding or modifying authorizations for services and treatments in violation of
 14 Ins. C. § 796.04;

15 d. Inducing plaintiff to obtain medical services and treatment, and inducing
 16 providers to perform services and give treatment, based on authorizations that were rescinded in
 17 violation of Ins. C. § 796.04;

18 e. Causing plaintiff to be subjected to billing and collection efforts, and possible
 19 lawsuits, by providers who were not paid by Nationwide.

20 44. Plaintiff "has suffered injury in fact and has lost money or property as a result of
 21 [Nationwide's] unfair competition." (Business & Professions Code ["B.&P."] § 17203.)

22 Plaintiff can "compl[y] with Section 382 of the Code of Civil Procedure." (B.&P. § 17204.)

23 45. Plaintiffs are informed and believe and thereon allege that the unlawful,
 24 fraudulent or unfair conduct alleged above is continuing in nature and reflects widespread acts or
 25 practices engaged in by Nationwide.

26 46. Plaintiffs request that this Court issue an injunction prohibiting Nationwide from:
 27 a. Utilizing a Medical Information questionnaire that is unfair as alleged above;
 28 b. Engaging in postclaims underwriting in violation of Ins. C. § 10384; and

1 c. Rescinding or modifying authorizations for services or treatments in violation of
2 Ins. C. § 796.04.

3 47. Plaintiffs respectfully request an award of attorney's fees under Code of Civil
4 procedure section 1021.5.

FIFTH CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE

6 (Against defendant Linda Debolt)

7 48. Plaintiff refers to all preceding paragraphs and incorporates those paragraphs as
8 though set forth in full in this cause of action.

9 49. Plaintiff is informed and believes and thereon alleges that Linda Debolt was
10 Nationwide's agent during the application process for the policy that Nationwide issued to the
11 plaintiff.

12 50. Plaintiff is informed and believes and thereon alleges that Linda Debolt held
13 herself out as a specialist in healthcare insurance and directed plaintiff through the application
14 process.

15 51. Linda Debolt owed plaintiff a duty of care to see that plaintiff's interests were
16 fully protected by completing the application in a complete and accurate manner. Linda Debolt
17 owed plaintiff a duty to ensure that all disclosures were made properly in the application process.
18 Moreover, Linda Debolt owed a heightened duty because she held herself out to be a specialist in
19 health insurance for individuals.

20 52. Plaintiff disclosed to Linda Debolt all material medical history. Linda Debolt
21 advised plaintiff what information Nationwide wanted on the application and directed the
22 application process. Linda Debolt knew that Nationwide would rely on the information
23 disclosed in the health history questionnaire. In fact, Nationwide cited plaintiff's failure to
24 disclose material information on the health history questionnaire as the basis for rescinding the
25 insurance policy.

26 53. At all relevant times, Linda Debolt knew that plaintiff was relying on her
27 experience, skill, accuracy, good faith, and expertise as a specialist in health insurance for
28 individuals.

- 11 -

COMPLAINT AND DEMAND FOR JURY TRIAL

1 54. Plaintiff is informed and believes and thereon alleges that Linda Debolt was
2 negligent in other acts or omissions of which plaintiff is presently unaware.

3 55. As a proximate result of Linda Debolt's negligence, plaintiff has suffered, and
4 will continue to suffer, general and special damages to be determined at trial.

PRAYER

6 WHEREFORE, plaintiffs pray for judgment as follows:

1. For general and consequential damages according to proof, plus prejudgment interest, for breach of contract;
 2. For general and consequential damages, and damages for emotional distress, plus prejudgment interest, for breach of the implied covenant of good faith and fair dealing;
 3. For punitive and exemplary damages;
 4. For attorneys' fees incurred to recover benefits under the policy;
 5. For a declaration of rights and obligations of the parties under the written agreements in question;
 6. For injunctive relief under Business & Professions Code section 17200;
 7. For attorneys' fees under Code of Civil Procedure section 1021.5;
 8. For costs of suit incurred herein; and
 9. For such other and further relief as the Court deems just and proper.

DATED: February 22, 2007

SHERNOFF BIDART & DARRAS LLP

WILLIAM M. SHERNOFF
EVANGELINE FISHER GROSSMAN
JOEL A. COHEN
Attorneys for Plaintiffs

1

2

DEMAND FOR JURY TRIAL

3

Plaintiffs hereby demand a jury trial on all causes of action that are triable to a jury.

4

5

DATED: February 22, 2007

SHERNOFF BIDART & DARRAS LLP

6

7

Evangeline Grossman

8

WILLIAM M. SHERNOFF
EVANGELINE FISHER GROSSMAN
JOEL A. COHEN
Attorneys for Plaintiffs

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COMPLAINT AND DEMAND FOR JURY TRIAL

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FILED

APR 12 2007

KIM TURNER
 Court Executive Officer
 MARIN COUNTY SUPERIOR COURT
By: A. Garcia, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9
 COUNTY OF MARIN

10
 11 DONALD SAXBY, an individual, and
 BARBARA SAXBY, an individual,

12 Plaintiffs,

13 vs.

14 NATIONWIDE LIFE INSURANCE
 COMPANY, dba NATIONWIDE
 HEALTH PLANS, LINDA DEBOLT, an
 16 individual, and DOES 1 through 50,
 inclusive,

17 Defendants.

18 Case No.: CV070858

**DEFENDANT NATIONWIDE LIFE
 INSURANCE COMPANY'S ANSWER
 TO COMPLAINT**

Action Filed: February 27, 2007

Trial Date: Not set

19 Defendant Nationwide Life Insurance Company ("Nationwide"), for itself alone,
 20 and for no other defendant, hereby answers plaintiffs' Complaint on file in this matter as
 21 follows:

22 1. Pursuant to Section 431.30(d) of the California Code of Civil Procedure,
 23 Nationwide denies generally and specifically each and every allegation contained in each
 24 and every paragraph of plaintiffs' Complaint. Nationwide specifically denies that
 25 plaintiffs have been damaged in any amount whatsoever or at all and further specifically
 26 denies that plaintiffs, or either of them, are entitled to recover any damages in any amount
 27 or at all.

28

1 Further answering the Complaint, Nationwide asserts the following affirmative
2 defenses:

FIRST AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

6 2. Plaintiffs' Complaint fails to state facts sufficient to state a cause of action
7 against Nationwide.

SECOND AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

11 3. California Civil Code Section 3294, under which plaintiffs' claims for
12 punitive damages are made against Nationwide, if applicable in this action, is invalid on its
13 face or is applied to Nationwide, pursuant to Article I, Section 10, Article IV, Section 2
14 and the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the
15 United States, and Article I, Sections 7, 9, 15 and 17, and Article IV, Section 16 of the
16 California Constitution.

THIRD AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

20 4. To the extent that any of plaintiffs' claims are based upon the theory that
21 there exists an implied covenant of good faith and fair dealing in an insurance contract, this
22 doctrine, as applied by California courts, is unconstitutional pursuant to the First, Fifth,
23 Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and
24 Article I, Sections 2, 7, 9, 15 and 17, and Article IV, Section 16 of the California
25 Constitution.

FOURTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

3 5. On or about January 19, 2006, plaintiffs Don and Barbara Saxby completed
4 and executed a written application to Nationwide for health insurance online. On the
5 application, in response to question 1(b), plaintiffs stated and represented in writing that
6 they had not, within the past 10 years, been treated for or diagnosed with alcoholism or
7 been advised to reduce alcohol or drug use. On the application, and in response to
8 question 1(c), plaintiffs stated and represented in writing that they had not, within the past
9 10 years, used marijuana, cocaine, heroine, methamphetamines, LSD or any other non-
10 prescription drugs. On the application, and in response to question 2(h), plaintiffs stated
11 and represented in writing that they had not, within the past 10 years, sought or been
12 advised to have treatment for, had follow-up visits for, or been diagnosed with asthma, hay
13 fever, allergies (including desensitization), COPD (chronic obstructive pulmonary
14 disease), cystic fibrosis, emphysema, sarcoidosis, shortness of breath, tuberculosis,
15 pneumonia, sleep apnea, or any disease, disorder or injury of the lungs or respiratory
16 system, except that Don Saxby stated that he was treated for allergies with Claritin on
17 random start and ending dates and that the condition still did not exist. On the application,
18 and in response to question 2(i), plaintiffs stated and represented in writing that they had
19 not, within the past 10 years, sought or been advised to have treatment for, had follow-up
20 visits for, or been diagnosed with osteoarthritis, rheumatoid arthritis, back or neck pain,
21 disease or disorder of the spine or spinal surgery, gout, osteoporosis, connective tissue
22 disease, fibromyalgia, lupus, scleroderma, psoriasis or other disease, disorder or injury of
23 the bones, joints or muscles. On the application in response to question 2(l), plaintiffs
24 stated and represented in writing that they had not, within the past 10 years; sought or been
25 advised to have treatment for, had follow-up visits for, or been diagnosed with depression,
26 panic attacks, anxiety, bi-polar disorder, obsessive-compulsive disorder, schizophrenia,
27 attention deficit disorder, attention deficit hyperactivity disorder or eating disorder. On the
28 application in response to question 2(n), plaintiffs stated and represented in writing that

1 they had not, within the past 10 years, sought or been advised to have treatment for, had
2 follow-up visits for or been diagnosed with chronic fatigue syndrome, Lyme disease,
3 Marfan syndrome, anemia, weight loss, loss of appetite, lymph node enlargement or any
4 other disease or disorder of the blood. On the application, and in response to question 3(a),
5 plaintiffs stated and represented in writing, that they had not, within the past 10 years, been
6 advised to have consultations or referrals to another physician, diagnostic tests, treatment,
7 surgery or hospitalization (whether completed or not). On the application, and in response
8 to question 5, plaintiffs stated and represented in writing that they had not, within the past
9 2 years, been prescribed or recommended medication, herbal or nutritional supplements.
10 On the application and in response to question 8, plaintiffs stated and represented in
11 writing that they had not, within the past 5 years, had an exam, consultation, checkup, been
12 hospitalized or been treated by a doctor, acupuncturist, chiropractor, physical therapist,
13 psychiatrist, psychologist, nurse practitioner, physician's assistant or licensed mental
14 health counselor for any reason. In reliance upon the application and upon the truth of the
15 statements and representations contained in the application, Nationwide accepted the
16 application and issued Certificate No. 709634, under Plan AL, Policy GH-1000, to
17 plaintiffs.

18 6. Each of the representations and statements in the application were made by
19 plaintiffs for the purpose of inducing Nationwide to rely thereon, and upon such reliance,
20 to extend coverage to plaintiff under the Certificate and Policy. Nationwide did, in fact,
21 rely upon such representations in issuing coverage under the Certificate and the Policy to
22 plaintiffs. Each of plaintiff's representations and statements were material to the risk
23 undertaken by Nationwide in issuing coverage to plaintiffs under the Certificate and the
24 Policy because Nationwide would not have issued coverage under the Certificate and the
25 Policy if it had known that the representations and statements, or any of them, were false,
26 untrue, or incomplete.

27 7. Nationwide alleges, upon information and belief, that each of the
28 representations and statements contained in the application and as set forth in paragraph 5

1 above, were false and incomplete and were known by plaintiff to be false and incomplete
 2 at the time such representations and statements were made because of the following facts,
 3 among other things: contrary to their response to question 1(b), plaintiffs had, within the
 4 past 10 years, been treated or diagnosed with alcoholism or had been advised to reduce
 5 drug or alcohol use; contrary to their response to question 1(c), plaintiffs had, within the
 6 past 10 years, used marijuana, cocaine, heroine, methamphetamines, LSD or any other
 7 non-prescription drugs; contrary to their response to question 2(h), plaintiffs had, within
 8 the past 10 years, sought or had been advised to have treatment for, had follow-up visits
 9 for, or been diagnosed with asthma, hay fever, allergies (including desensitization) COPD
 10 (chronic obstructive pulmonary disease), cystic fibrosis, emphysema, sarcoidosis,
 11 shortness of breath, tuberculosis, pneumonia; sleep apnea, or any disease, disorder or
 12 injury of the lungs or respiratory systems, except that Don Saxby stated that he was treated
 13 for allergies with Claritin on random start and ending dates and that the condition still did
 14 not exist; contrary to their response to question 2(i), plaintiffs had, over the past 10 years,
 15 sought or been advised to have treatment for, had follow-up visits for, or been diagnosed
 16 with osteoarthritis, rheumatoid arthritis, neck or back pain, disease or disorder of the spine
 17 or spinal surgery, gout, osteoporosis, connective tissue disease, fibromyalgia, lupus,
 18 scleroderma, psoriasis, or other disease, disorder or injury of the bones, joints or muscles;
 19 contrary to their response to question 2(l), plaintiffs had, within the past 10 years, sought
 20 or been advised to have treatment for, had follow-up visits for, or been diagnosed with
 21 depression, panic attacks, anxiety, bi-polar disorder, obsessive-compulsive disorder;
 22 schizophrenia, attention deficit disorder, attention deficit hyperactivity disorder or eating
 23 disorder; contrary to the response to question 2(n), plaintiffs had, or within the past 10
 24 years, sought or been advised to have treatment for, had follow-up visits for, or been
 25 diagnosed with chronic fatigue syndrome, Lyme disease, Marfan's syndrome, anemia,
 26 weight loss, loss of appetite, lymph node enlargement or any other disease or disorder of
 27 the blood; contrary to their response to question 3(a), plaintiffs had, within the past 10
 28 years, been advised to have consultations or referrals to another physician, diagnostic tests,

1 treatment, surgery or hospitalization (whether completed or not); contrary to their response
2 to question 5, plaintiffs had, within the past two years, been prescribed or recommended
3 medication, herbal or nutritional supplements; and, contrary to their response to question 8,
4 plaintiffs had, within the past five years, had an exam, consultation, check-up, been
5 hospitalized or been treated by a doctor, acupuncturist, chiropractor, physical therapist,
6 psychiatrist, psychologist, nurse practitioner, physician's assistant or licensed medical
7 health counselor for any reason.

8 8. Nationwide had no knowledge of the falsity, untruth, and incompleteness of
9 such representations and statements until discovered during the course of an investigation
10 of a claim(s) made by plaintiffs for benefits under the Certificate and the Policy. Promptly
11 thereafter, Nationwide denied benefits under the Certificate Policy and rescinded coverage
12 under the Certificate and the Policy.

FIFTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

16 9. Nationwide repeats and realleges paragraphs 1 through 8 of this Answer and
17 incorporates the same herein by reference as though fully set forth.

18 10. Nationwide is informed and believes, and upon such information and belief
19 alleges, that in making the representations and statements in the application, plaintiffs
20 knew that their representations were false and that they intended by their actions to induce
21 Nationwide to issue coverage under the Certificate and the Policy.

11. In actual and justifiable reliance upon the false and fraudulent
representations and statements made by plaintiffs in the application, Nationwide issued and
delivered coverage to plaintiffs under the Certificate and the Policy.

25 12. As a proximate result of plaintiffs' fraud, Nationwide was entitled to rescind
26 coverage under the Certificate and the Policy. As a result of plaintiffs' fraud, Nationwide
27 is not liable to plaintiffs for any of the benefits or other sums sought in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

3 13. Nationwide repeats and reallege paragraphs 1 through 12 of this Answer and
4 incorporates the same herein by reference as though fully set forth.

5 14. Nationwide alleges, upon information and belief, that plaintiffs, in executing
6 the application and in making the statements and representations hereinabove set forth,
7 concealed and neglected to communicate to Nationwide the following facts which were
8 within her knowledge and which were material to the risks to be insured against and to the
9 issuance of the Certificate, all of which facts they were required to have communicated to
10 Nationwide: (1) plaintiffs had, within the past 10 years, been treated or diagnosed with
11 alcoholism or had been advised to reduce drug or alcohol use; (2) plaintiffs had, within the
12 past 10 years, used marijuana, cocaine, heroine, methamphetamines, LSD or any other
13 non-prescription drugs; (3) plaintiffs had, within the past 10 years, sought or had been
14 advised to have treatment for, had follow-up visits for, or been diagnosed with asthma, hay
15 fever, allergies (including desensitization) COPD (chronic obstructive pulmonary disease),
16 cystic fibrosis, emphysema, sarcoidosis, shortness of breath, tuberculosis, pneumonia,
17 sleep apnea, or any disease, disorder or injury of the lungs or respiratory systems, except
18 Don Saxby's treatment for allergies with Claritin on random start and ending dates; (4)
19 plaintiffs had, within the past 10 years, sought or been advised to have treatment for, had
20 follow-up visits for, or been diagnosed with osteoarthritis, rheumatoid arthritis, neck or
21 back pain, disease or disorder of the spine or spinal surgery, gout, osteoporosis, connective
22 tissue disease, fibromyalgia, lupus, scleroderma, psoriasis, or other disease, disorder or
23 injury of the bones, joints or muscles; (5) plaintiffs had, within the past 10 years, sought or
24 been advised to have treatment for, had follow-up visits for, or been diagnosed with
5 depression, panic attacks, anxiety, bi-polar disorder, obsessive-compulsive disorder;
6 schizophrenia, attention deficit disorder, attention deficit hyperactivity disorder or eating
7 disorder; (6) plaintiffs had, or within the past 10 years, sought or had been advised to have
8 treatment for, had follow-up visits for, or been diagnosed with chronic fatigue syndrome.

1 Lyme disease, Marfan's syndrome, anemia, weight loss, loss of appetite, lymph node
2 enlargement or any other disease or disorder of the blood; (7) plaintiffs had, within the past
3 10 years, been advised to have consultations or referrals to another physician, diagnostic
4 tests, treatment, surgery or hospitalization (whether completed or not); (8) plaintiffs had,
5 within the past two years, been prescribed or recommended medication, herbal or
6 nutritional supplements; (9) plaintiffs had, within the past five years, had an exam,
7 consultation, check-up, been hospitalized or been treated by a doctor, acupuncturist,
8 chiropractor, physical therapist, psychiatrist, psychologist, nurse practitioner, physician's
9 assistant or licensed medical health counselor for any reason.

10 15. Nationwide further alleges, upon information and belief, that plaintiffs
11 concealed and neglected to communicate such material facts despite inquiry thereto by
12 Nationwide. In the absence of any waiver of any right of Nationwide to such information,
13 Nationwide had no means of ascertaining and could not be presumed to know such
14 material facts at the time it issued coverage under the Certificate and the Policy. On the
15 contrary, such facts were solely within the knowledge of plaintiffs. Each of such facts
16 were material to the risk undertaken by Nationwide because Nationwide would not have
17 issued coverage under the Certificate and the Policy had it known such facts.

18 16. Nationwide had no knowledge of the concealment of and neglect to
19 communicate such material facts by plaintiffs until discovered in the course of an
20 investigation of a claim(s) made for benefits under the Certificate and the Policy.
21 Promptly thereafter, Nationwide denied benefits under the Certificate and the Policy and
22 rescinded the Certificate and the Policy.

23 17. Nationwide is not liable to plaintiffs, or either of them, for any of the benefits
24 or other sums sought in the Complaint because of the foregoing concealment of material
25 facts.

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1 **SEVENTH AFFIRMATIVE DEFENSE**

2 **(To All Causes Of Action Alleged Against Nationwide)**

3 18. Plaintiffs have failed to mitigate their alleged damages, if any.

5 **EIGHTH AFFIRMATIVE DEFENSE**

6 **(To All Causes Of Action Alleged Against Nationwide)**

7 19. The damages suffered by plaintiffs, if any, were directly and proximately
8 caused by the acts, omissions, carelessness, or negligence of plaintiffs or their agents.
9 Plaintiffs' recovery, if any, should be diminished to the extent that said alleged damages
10 are attributable to said acts, omissions, carelessness, or negligence.

11 **NINTH AFFIRMATIVE DEFENSE**

12 **(To All Causes Of Action Alleged Against Nationwide)**

13 20. The damages suffered by plaintiffs, if any, were directly and proximately
14 caused by the acts, omissions, carelessness, or negligence of persons other than
15 Nationwide. Plaintiffs' recovery, if any, should be diminished to the extent that said
16 alleged damages were attributable to said acts, omissions, carelessness, or negligence.

17 **TENTH AFFIRMATIVE DEFENSE**

18 **(To All Causes Of Action Alleged Against Nationwide)**

19 21. Plaintiffs are estopped from asserting any entitlement to Certificate and
20 Policy benefits or to compensatory or punitive damages.

21 **ELEVENTH AFFIRMATIVE DEFENSE**

22 **(To All Causes Of Action Alleged Against Nationwide)**

23 22. Plaintiffs have waived any claim to entitlement to coverage under the
24 Certificate and the Policy or to compensatory or punitive damages.

TWELFTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

3 23. Some or all of plaintiffs' claims are barred by the applicable statutes of
4 limitations, including, but not limited to, California Code of Civil Procedure sections 337,
5 338, 339 and 340, California Business & Professions Code section 17208 and California
6 Civil Code section 1783.

THIRTEENTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

10 24. The Complaint and each alleged cause of action contained therein is barred
11 by laches because of plaintiffs' conduct and actions.

FOURTEENTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

15 25. The Complaint and each alleged cause of action contained therein is barred
16 by reason of plaintiffs' unclean hands.

FIFTEENTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

20 26. Although Nationwide does not admit to engaging in any conduct alleged by
21 plaintiffs, to the extent any conduct by Nationwide could be construed as relating to
22 matters alleged in the Complaint, that conduct was not and is not unlawful.

SIXTEENTH AFFIRMATIVE DEFENSE

(To All Causes Of Action Alleged Against Nationwide)

26 27. Although Nationwide does not admit to engaging in any conduct alleged by
27 plaintiffs, to the extent any conduct by Nationwide could be construed as relating to
28 matters alleged in the Complaint, that conduct was not and is not unfair within the meaning

1 of California Business & Professions Code Sections 17200 *et seq.*, and is justified by
2 legitimate business and competitive reasons.
3

4 **SEVENTEENTH AFFIRMATIVE DEFENSE**

5 **(To All Causes Of Action Alleged Against Nationwide)**

6 28. Even if plaintiffs could establish the elements of a violation of the unfair
7 competition law, in light of all the relevant considerations, the Court can and should
8 exercise its discretion and decline to award injunctive or other equitable relief.
9

10 WHEREFORE, Nationwide prays for judgment as follows:

- 11 1. That plaintiffs take nothing by reason of their Complaint;
12 2. For costs of suit, including attorneys' fees; and,
13 3. For such other and further relief as the Court deems just and proper.
14

15
16 Dated: April 11, 2007

17 THELEN REID BROWN RAYSMAN &
18 STEINER LLP

19 By

John L. Viola
Attorneys for Defendant
Nationwide Life Insurance Company

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1 *Saxby, et al. v. Nationwide Life Ins. Co., et al.*

2 **PROOF OF SERVICE BY MAIL**

3 CASE NO. CV070858

4 I am over the age of 18 and not a party to the within action. I am employed in the County
5 of Los Angeles, State of California by Thelen Reid Brown Raysman & Steiner LLP. My business
6 address is 333 South Hope Street, Suite 2900, Los Angeles, California 90071.

7 On April 11, 2007, I served the following entitled document:

8 **DEFENDANT NATIONWIDE LIFE INSURANCE
9 COMPANY'S ANSWER TO COMPLAINT**

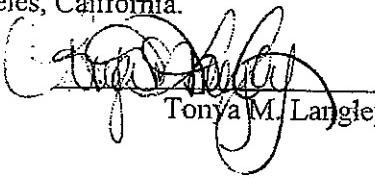
10 by placing a true and correct copy thereof in a sealed envelope addressed as follows:

11 William M. Shernoff, Esq.
12 **SHERNOFF BIDART & DARRAS**
13 600 S. Indian Hill Boulevard
Claremont, California 91171
Telephone: 909.621.4935
Facsimile: 909.625.6915

14 I am readily familiar with the firm's business practice for collection and processing of
15 correspondence for mailing with the United States Postal Service. On this day, I placed for
16 collection and processing the above document to be deposited with the United States Postal
17 Service in the ordinary course of business. And in the ordinary course of the firm's business, such
18 correspondence is deposited with the United States Postal Service the same day that it is collected.

19 I declare under penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct.

21 Executed on April 11, 2007, at Los Angeles, California.

22 
23 Tonya M. Langley

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MARIN COUNTY SUPERIOR COURT
Civic Center, Room 113
P. O. Box 4988
San Rafael, CA 94913-4988

6-13-C7

PLAINTIFF:

Definito Snyby

vs.

DEFENDANT:

National Life Insurance Co

CASE NO. CU-070858

CIVIL / MINUTES / OSC / SERVICE

CSCRT	JUDGE	Dwyer	REPORTER	—	CLERK	
APATT	ATTORNEY	Joe Cohen	appeared for	TP	Court Clrt	
APPPP	Plaintiff/Petitioner				is present in pro per.	
APNAP	No appearance by or for the parties.					
APNAB	No appearance by or for the parties.					
CSMDT	THE COURT MODIFIES MANDATORY APPEARANCE DATES ON CASE MANAGEMENT SCHEDULE AS FOLLOWS: PREVIOUS DATES VACATED:					
	Filing of Proof of Service	7/19/07	9:00 a.m.	AS to LINCA		
	Filing of Answer or Default	7/19/07	9:00 a.m.	Debt		
	Status Conference	7/19/07	9:00 a.m.			

APOS C ORDER TO SHOW CAUSE ISSUED FOR:

(Name):

For Failing to Appear on _____ or file Proof of Service Request to Enter Default
As to _____

YOU ARE HEREBY ORDERED TO APPEAR IN COURT AS SET FORTH BELOW TO SHOW CAUSE WHY YOU FAILED TO COMPLY WITH THE STANDARD FILING REQUIREMENTS OF THE CASE MANAGEMENT SCHEDULE IN THE ABOVE REFERENCED CASE:

Date: 9:00 a.m. Courtroom: before Judge:

FNASO IT IS FURTHER ORDERED THAT THE FOLLOWING SANCTIONS SHALL BE IMPOSED IN THE AMOUNT OF: \$ _____ DUE ON _____

 CSTXT NTINT

Plaintiff/petitioner/counsel of record has 15 days to file proof of service
 Request to enter default, as to defendant(s) _____ Failure to file or appear in court will result in the dismissal of the individual defendant(s) or the entire case.

 CSDLP Case dismissed, lack of prosecution CSDOT Case disposed before trial; Dismissed, other reasons _____ CSDSP Case disposed in its entirety

Kim Turner
 JUDGE OF THE SUPERIOR COURT

DECLARATION OF PERSONAL SERVICE/SERVICE BY MAIL

(Code of Civil Procedure Sections 1013a and 2015.5)

I, the undersigned, under penalty of perjury, declare that I am over 18 years of age, a citizen of the United States, an employee of the County of Marin and not a party to the action. I served this Civil Minutes Order by Personal Service, or Service by Mail (by placing true copies thereof, enclosed in a separate envelope, with postage fully prepaid by the filing party, in the United States Post Office mail box, at San Rafael, Marin County, California) on the date written herein, addressed to the parties/counsel as indicated on the complaint.

William Sherman
 600 So. Indian Hill Blvd
 Claremont CA 91711-5498

FILED

Executed at San Rafael, California

6/14/07

KIM TURNER
 Acting Court Executive Officer KIM TURNER
 Court Executive Officer
 MARIN COUNTY SUPERIOR COURT
 By: J. Minkiewicz, Deputy

JUN 13 2007

dy #310-115 / CR004

1 **DYKEMA GOSSETT LLP**
2 JOHN L. VIOLA, SBN: 131407
3 333 South Grand Avenue
4 Suite 2100
5 Los Angeles, California 90071
6 Telephone: (213) 457-1800
7 Facsimile: (213) 457-1850

8 Attorneys for Defendant
9 NATIONWIDE LIFE INSURANCE COMPANY

FILED

JAN 31 2008

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Naeve, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF MARIN**

10 DONALD SAXBY, an individual, and
11 BARBARA SAXBY, an individual,

12 Plaintiffs,

13 vs.

14 NATIONWIDE LIFE INSURANCE
15 COMPANY, dba NATIONWIDE HEALTH
16 PLANS, LINDA DEBOLT, an individual,
17 and DOES 1 through 50, inclusive,

18 Defendants.

Case No. CV070858

[Assigned for All Purposes to Hon. Lynn
Duryee, Dept. L]

**[PROPOSED] ORDER DENYING
PLAINTIFFS' MOTIONS TO QUASH**

Date: January 25, 2008
Time: 9:00 a.m.
Dept.: L

Complaint Filed: February 27, 2007
Trial Date: March 19, 2008

19 Plaintiffs' Motions to Quash the Subpoenas served by defendant Nationwide Life
20 Insurance Company on Dr. Claudia Perez, Dr. Joan Steidinger, and Blue Shield, San
21 Francisco, came on regularly for hearing before this Court on January 25, 2008. On
22 January 24, 2008, the Court issued its tentative ruling as follows:

23 "Plaintiff's Motion to Quash is denied. While the defense against
24 the bad faith cause of action may be limited to the records on which
25 defendant relied to rescind the policy, plaintiff sued for a variety of
26 other claims including declaratory relief and breach of contract.
27 The requested records are relevant for these claims as well as other
28 controverted issues such as creditability and impeachment."

27 ///

28 ///

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTIONS TO QUASH

1 Counsel for the parties not having informed the Court that they wish to present oral
2 argument on the Motions, the Court's tentative ruling becomes the Order of the Court,
3 pursuant to Local Rule 1.6(B).

4 IT IS THEREFORE ORDERED that:

5 1. Plaintiffs' Motion to Quash the Subpoena served by Nationwide Life
6 Insurance Company on Dr. Clandia Perez is DENIED;

7 2. Plaintiffs' Motion to Quash the Subpoena served by defendant Nationwide
8 Life Insurance Company on Dr. Joan Steidinger is DENIED; and,

9 3. Plaintiffs' Motion to Quash the Subpoena served upon Blue Shield, San
10 Francisco, is DENIED.

11 Dated: JAN 31 2008

12 By: LYNN DURYEE
13 Honorable Lynn Duryee
Judge of the Superior Court

14 Approved as to Form:

15 By: Joel Cohen

16 Joel Cohen
17 Attorneys for Plaintiffs
Donald Saxby and Barbara Saxby

18 Dated: 1/28/08

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21 IDJLV

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2
[PROPOSED] ORDER DENYING PLAINTIFFS' MOTIONS TO QUASH

1 *Saxby vs. Nationwide*

CASE NO. CV070858

4 I am over the age of 18 and not a party to the within action. I am employed in the County
5 of Los Angeles, State of California by Dykema Gossett LLP. My business address is 333 South
Grand Avenue, Suite 2100, Los Angeles, California 90071-3048.

6 On January 29, 2008, I served a true and correct copy of the following entitled document:

7 **[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION TO QUASH**

8 as follows:

9 William M. Shernoff, Esq.
10 Evangeline Fisher-Grossman, Esq.
Joel Cohen, Esq.
11 **SHERNOFF BIDART & DARRAS**
600 S. Indian Hill Boulevard
Claremont, California 91171
Telephone: 909.621.4935
Facsimile: 909.625.6915
13 *Attorneys for Plaintiff*

James C. Krieg
KRIEG, KELLER, SLOAN, REILLEY &
ROMAN LLP
114 Sansome Street, 4th Floor
San Francisco, CA 94104
Telephone: 415.249.8330
Facsimile: 415.249.8333
Attorneys for Defendant Linda DeBolt

14 [X] **BY MAIL** I am readily familiar with the firm's business practice for collection and
15 processing of correspondence for mailing with the United States Postal Service. On this
16 day, I placed for collection and processing the above document to be deposited with the
United States Postal Service in the ordinary course of business. And in the ordinary
17 course of the firm's business, such correspondence is deposited with the United States
Postal Service the same day that it is collected.

18 [] **BY FACSIMILE** I caused the attached documents to be transmitted to the interested
19 party in this action by faxing a true copy from facsimile telephone number (213) 457-
1850. The document was transmitted by facsimile transmission and the transmission was
20 reported as complete and without error. The transmission report was properly issued by
the transmitting facsimile machine.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23 Executed on January 29, 2008, at Los Angeles, California.

24 
25 Tonya M. Langley
26
27
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EXHIBIT 2

1 James C. Krieg [SBN 77069] (jkrieg@kksrr.com)
2 Allison Lane Cooper [SBN 152384] (acooper@kksrr.com)
3 KRIEG, KELLER, SLOAN, REILLEY & ROMAN LLP
4 114 Sansome Street, 4th Floor
5 San Francisco, CA 94104
6 Telephone: (415) 249-8330
7 Facsimile: (415) 249-8333

REC'D FEB 26 2008

6 Attorneys for Defendant
7 LINDA DEBOLT

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF MARIN

12 DONALD SAXBY, an individual, and
13 BARBARA SAXBY, an individual,

14 Plaintiffs,

15 v.

16 NATIONWIDE LIFE INSURANCE
17 COMPANY, dba NATIONWIDE LIFE
18 PLANS, LINDA DEBOLT, and DOES 1
through 50, inclusive,

19 Defendants.

20 Case No.: CV070858

21 DEFENDANT LINDA DEBOLT'S
SETTLEMENT CONFERENCE
STATEMENT AND NOTICE OF
SETTLEMENT

22 Date: March 10, 2008
23 Time: 10:00 a.m.
24 Dept.: "L"

25 Defendant Linda DeBolt has reached a settlement of all of plaintiffs' against her.
26 DeBolt anticipates filing a request for dismissal, with prejudice, of such claims before the
27 Mandatory Settlement Conference. There are no other pending claims against DeBolt. In
28 / / /
/ / /

DEFENDANT LINDA DEBOLT'S SETTLEMENT CONFERENCE STATEMENT AND
NOTICE OF SETTLEMENT
Case No. CV070858

1 view of the pending settlement, which resolves all claims against her, DeBolt does not expect
2 that she will be participating in the Mandatory Settlement Conference scheduled for March
3 10, 2008.

4 Dated: February 22, 2008

KRIEG, KELLER, SLOAN, REILLEY & ROMAN LLP

5 By: 
6
7
8
9

Allison Lane Cooper
Attorneys for Defendant
LINDA DEBOLT

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DEFENDANT LINDA DEBOLT'S SETTLEMENT CONFERENCE STATEMENT AND
NOTICE OF SETTLEMENT

Case No. CV070858

Saxby, et al. v. Nationwide Life Insurance, et al.
Marin County Superior Court Case No. CV070858

1 PROOF OF SERVICE

2 I, the undersigned, declare under penalty of perjury under the laws of the State of California
3 that the following is true and correct:

4 I am employed in the City and County of San Francisco, State of California, in the office of
5 a member of the bar of this court, at whose direction the service was made. I am over the age of
6 eighteen (18) years and not a party to or interested in the within-entitled action. I am an employee
7 of KRIEG, KELLER, SLOAN, REILLEY & ROMAN LLP, and my business address is 114 Sansome Street,
8 4th Floor, San Francisco, California 94104.

9 On February 22, 2008, I served following document(s):

10 DEFENDANT LINDA DeBOLT'S SETTLEMENT CONFERENCE STATEMENT AND
11 NOTICE OF SETTLEMENT

12 served by the following means, on the person(s) listed below:

13 Evangeline F. Grossman
14 Shernoff Bidart & Darras, LLP
15 600 South Indian Hill Boulevard
16 Claremont, CA 91711
17 Telephone 909-621-4935
18 Facsimile 909-625-6915
Counsel for Plaintiff

19 John L. Viola
20 Dykema Gossett, LLP
21 333 S. Grand Avenue
22 Suite 2100
23 Los Angeles, CA 90071
24 Telephone 213-457-1800
25 Facsimile 213-457-1850
jviola@dykema.com

26 *Counsel for Defendant Nationwide Life Insurance
Company*

27 The document(s) were served by the following means:

28 By PERSONAL SERVICE. I personally delivered the documents to the persons at the
addresses listed above. (1) For a party represented by an attorney, delivery was made to the
attorney or at the attorney's office by leaving the document in an envelope or package clearly
labeled to identify the attorney being served with a receptionist or an individual in charge of the
office. (2) For a party, delivery was made to the party or by leaving the documents at the party's
residence with some person not less than 18 years of age between the hours of 8:00 a.m. and 6:00
p.m.

By UNITED STATES MAIL. I enclosed the documents in a sealed envelope or package
addressed to the persons at the addresses listed above; and (1) deposited the sealed envelope with
the United States Postal Service, with the postage fully prepaid; or (2) placed the envelope for
collection and mailing, following our ordinary business practices. I am readily familiar with this
business practice for collecting and processing correspondence for mailing. On the same day that
correspondence is placed for collection and mailing, it is deposited in the ordinary course of
business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package
was placed in the mail at San Francisco, California.

PROOF OF SERVICE
Case No. CV 070858

PROOF OF SERVICE

1

2

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4

By **OVERNIGHT DELIVERY**, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

5

6

7

— By **MESSENGER SERVICE**. I served the documents by placing them in an envelope or package addressed to the person at the address listed above and providing them to a professional messenger service for service. (*A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below*).

8

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12

— By **FAX TRANSMISSION**. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No errors were reported by the fax machine that I used.

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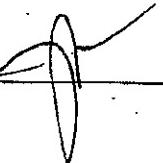
27

28

I declare under the penalty under the laws of the State of California that the foregoing is true and correct.

Dated: February 22, 2008

Joy Morla



PROOF OF SERVICE
Case No. CV 070858

Page 41

Page 43